LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 5 1968
JOHN F. DAVIS, CLERK

No. 1255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

REUBEN L. JONES,

Appellant,

vs.

STATE OF LOUISIANA,

Appellee.

Appeal from the Supreme Court of Louisiana.

APPELLANT'S PETITION FOR REHEARING

JACK & JACK, ATTORNEYS
By Wellborn Jack, Jr.
1625 Slattery Building
Shreveport, Louisiana

Attorneys for Appellant

ATTORNEY OF RECORD:
BILLY R. PESNELL,
Texas Eastern Building
Shreveport, Louisiana.

LECOMTE, SHREVEPORT, LOUISIANA

No. 1255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

REUBEN L. JONES,

Appellant,

vs.

STATE OF LOUISIANA,

Appellee.

Appeal from the Supreme Court of Louisiana.

APPELLANT'S PETITION FOR REHEARING

APPELLANT'S PETITION FOR REHEARING

For the following reasons, petitioner-appellant prays that the Court grant a rehearing of its June 10, 1968, *per curiam* dismissal of this appeal "for want of a substantial federal question."

The Administration of Criminal Justice in Louisiana and the Adjudicatory Processes of the Court Require that the Decision of the Court Herein be Informed by Brief and Argument and Supported by Reasoned Explanation Disclosing the Grounds Upon Which that Judgment Rests.

Three weeks before the *per curiam* dismissal of this appeal "for want of a substantial federal question", the Court decided *Duncan v. Louisiana*, 390 U.S. ....., 88 S. Ct. 1444, holding for the first time "that the right to jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction." 88 S. Ct. at 1450. In connection with this holding the Court in its opinion, 88 S. Ct. at 1453, recognized that "it is necessary to draw a line in the spectrum of crime, separating petty from serious infractions" and that this "definitional task necessarily falls on the courts." Although various criteria for distinction between petty and serious offenses are discussed generally by the Court in its opinion, the concluding paragraph of the Court's opinion clearly indicates that the offense involved in the *Duncan* case, Simple Battery, did not require settlement now upon particular criteria or the drawing now of a clear definitional line of demarcation:

> "We need not, however, settle in this case the exact location of the line between petty offenses and serious crimes. It is sufficient for our purposes that a crime punishable by two years in prison is, based on past and contemporary standards in this

country, a serious crime and not a petty offense." 88 S. Ct. 1454.

The proper disposition of this instant appeal requires that the line of distinction properly left inexactly located in *Duncan* now be more closely drawn. By dismissing the instant appeal, the Court has, or has given the appearance of having, more closely drawn the line of distinction between petty and serious offenses. The Court has allowed to stand unreversed the trial and conviction without a jury by the State of Louisana of Reuben L. Jones for the offenses of Possession of Burglar Tools and Peeping Tom. These offenses are known to the bench and bar of Louisiana to involve in their elements moral turpitude and specific criminal intent and to be punishable by imprisonment for one or two years and six months respectively. Following as it does in the wake of *Duncan*, the dismissal of this appeal cannot escape construction by bench and bar in Louisiana as a holding that these offenses are petty offenses and for that reason did not present "a substantial federal question."

Has, however, the Court so held? The per curiam opinion does not disclose the grounds upon which the Court's judgment rests. Until the grounds supporting the Court's dismissal of this appeal are made known by reasoned explanation, the *Duncan* case and this case will remain irreconcilable to bench and bar in Louisiana to the detriment of the administration of criminal justice in that state. At best — or at worst — the practical effect below of the dismissal of this appeal will be to limit

the holding in *Duncan* to the offense of Simple Battery, the offense with which Gary Duncan was charged.

If the Court has dismissed this appeal on the ground that the offenses of Possession of Burglar Tools and Peeping Tom are in its judgment "petty offenses," then the Court has dismissed on a ground neither urged nor argued by Louisiana in its Motion to Dismiss and in the Alternative to Affirm filed herein. Louisiana's motion, as were appellant's Original and Supplemental Jurisdictional Statements, was prepared prior to decision in *Duncan*. Prior to that decision the overriding concern of both parties to this case was with the fundamental question of whether the right of jury trial protected by the Sixth Amendment in federal criminal proceedings was also extended to state criminal proceedings by the Fourteenth Amendment. For argument on what was then the overriding issue, both parties herein specifically referred in their filings to the more extensive exploration of that issue found in the briefs on the merits filed in the then pending *Duncan* case. The *right* to jury trial had first to be established by *Duncan* for there to be reason for either party herein to embark upon the task of fully informing the Court of the facts and arguments bearing upon the subsequently raised issue of whether these particular offenses were serious or petty. To the extent that the dismissal of this appeal is or appears to be a holding that these particular offenses are petty offenses, the decision of the Court has not been informed by either brief or oral argument. Opportunity to do so should be afforded both parties by granting a rehearing so that the court may

make an informed judgment to be supported by reasoned explanation to the end that the state courts of Louisiana may be able to determine with some degree of certainty which offenses are serious and which are petty.

Infinitely more disturbing than the effect upon the administration of criminal justice in Louisiana, is the effect of the Court's *per curiam* herein upon the adjudicatory processes of the Court itself. This disturbing effect has been explored and discussed by distinguished friends and observers of the Court. Herbert Wechsler in his article, *Toward Neutral Principles of Constitutional Law*, 73 Harvard Law Review 1 (1959), poses the problem of the *per curiam* in the following language so particularly applicable to the new problems of constitutional interpretation and application opened up by *Duncan:*

> "Given the sublety and difficulty of the problem, the need and opportunity for clarifying explanation, are such unexplained decisions in a new domain of constitutional interpretation consonant with standards of judicial action that the Court or we can possibly defend? I realize that nine men often find it easier to reach agreement on result than upon reasons and that such difficulty may be posed within this field. Is it not preferable, however, indeed essential, that if this is so the variations of position be disclosed?" 73 Harv. L. Rev. 1, 21 (1959).

Professor Wechsler's answer to his own rhetorical question is equally relevant to the dismissal of the instant appeal:

> "The virtue or demerit of a judgment turns, therefore, entirely on the reasons that support it and

their adequacy to maintain any choice of values it decrees, or, it is vital that we add, to maintain the rejection of a claim that any given choice should be decreed." *Id.* at 19.

The integrity of the adjudicatory processes of the Court require that rehearing be granted and that the Court, informed by brief and argument, dispose of the substantial federal questions herein presented, by opinion on the merits supported by reasoned explanation disclosing the grounds on which its judgment rests.

Possession of Burglar Tools is a Serious Offense

Appellant was charged in two separate Bills of Information with two separate violations of Possession of Burglar Tools, Louisiana Revised Statutes 14:95, which statutory definition reads as follows:

"A. Illegal carrying of weapons is:

* * * * *

(3) The ownership, possession, custody or use of any tools, or dynamite or nitroglycerine, or explosives, or other instrumentality customarily used by thieves or burglars at any time by any person *with the intent to commit crime.*" (Emphasis added).

Both Bills of Information (No. 68,678 and No. 68,964) alleged that appellant was on the premises of another with a screwdriver and flashlight in his possession *"with the intent to commit the crime of Simple Burglary."* (Emphasis added). Proof of specific criminal intent to com-

mit an indisputably serious offense, Simple Burglary, was an essential element of the offense of Possession of Burglar Tools for which appellant was tried and convicted without a jury.

This offense is not one of those petty offenses triable before a judge alone in the original thirteen states at the time of the adoption of the Constitution. Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917 (1926). Nor is it even remotely analogous to any of those judge-tried petty offenses. Had the offense existed at Common Law, being most analogous to the offense of Criminal Attempt, we submit that it would have been triable by jury, involving as it does a universally reprehensible degree of moral turpitude.

Insofar as the penalty provisions of a Louisiana criminal statute can be taken to be for that state an approximate "gauge of its social and ethical judgments," *District of Columbia v. Clawans*, 300 U. S. 617, 628; 57 S. Ct. 660, 663 (1937), the offense of Possession of Burglar Tools is a serious offense by the federal standard of 18 U.S.C. 1, which defines petty offenses as those punishable by no more than six months imprisonment. The penalty provision of the Possession of Burglar Tools Statute, Louisiana Revised Statutes 14:95 B and C, reads as follows:

> "B. Whoever commits the crime of illegal carying of weapons shall be fined not more than $500.00, or imprisoned for not more than *one year* or both. (Emphasis added).

"C. On a second conviction, the offender shall be fined not less than $200.00 nor more than $1,000.00, or imprisoned for not more than *two years*, or both." (Emphasis added).

Appellant could have received maximum sentences of one and two years respectively for the first and second convictions of this statute.

We submit that there can be no question but that Possession of Burglar Tools as defined by Louisiana Revised Statutes 14:95 (3) is a serious offense constitutionally triable by jury because of both the moral quality of the offense and the length of the authorized prison term.

Peeping Tom is a Serious Offense

By a third Bill of Information (No. 68,676) appellant was charged with having committed the offense of Peeping Tom on the same date and at the same place and time that it was alleged in the first Burglar Tools Bill of Information (No. 68,678) that he committed that offense. Peeping Tom is defined by Louisiana Revised Statutes 14:284 in the following language:

"No person shall perform such acts as will make him a 'Peeping Tom' on or about the premises of another, or go upon the premises of another for the purpose of becoming a 'Peeping Tom'.

" 'Peeping Tom' as used in this Section means one who peeps through windows or doors, or other places situated on or about the premises of another for the purpose of spying upon or invading the privacy of persons spied upon without the consent of the

persons spied upon. It is not a necessary element of this offense that the 'Peeping Tom' be upon the premises of the person being spied upon."

This statute is found in Chapter 2, Part II of the Louisiana Criminal Code under the heading "OFFENSES AFFECTING PUBLIC MORALS." Also classified under that heading are the morally reprehensible offenses of "Operation of Places of Prostitution" (14:282) and "Telephone Communications, Improper Language" (14:-285), which latter offense makes *obscene telephone calls* punishable by fine of five thousand dollars and imprisonment of two years. Clearly, the offense of Peeping Tom has been classified by the Legislature as, and is, a sex offense.

The maximum penalty provided for the violation of the Peeping Tom statute is but six months and/or fine of five hundred dollars. Under the federal standard of 18 U.S.C. 1 the Louisiana offense of Peeping Tom is a petty offense. We submit that this federal standard cannot, at least in this instance, be taken as a measure of the social and ethical judgments of the State of Louisiana as applied to the offense of Peeping Tom.

The federal standard of 18 U.S.C. 1 was written as part of a skillful and careful comprehensive revision and review of federal crimes culminating in the enactment of Title 18 on September 1, 1948, as the new Federal Criminal Code. Comprehensive review of the maximum punishment prescribed for various crimes was undertaken in the interest of achieving rational uniformity within the

classification of 18 U.S.C. 1. The work of the revision committee in this regard is described by Hon. Alexander Holtzoff in his Preface to Title 18, U.S.C.A., West Publishing Co., at Page VI in the following words:

> "While in general the new Title 18 constitutes a restatement of pre-existing law, many changes have been made in the punishments prescribed for various crimes. In some instances the maximum penalties were increased, in others they were reduced. *The purpose was to arrive at uniform maximum penalties insofar as possible for similar crimes.* Wide discrepancies on that subject had crept into the law from time to time owing to the fact that various criminal provisions had been enacted at different times. *Violations of regulatory statutes not involving moral turpitude have been uniformly transformed by the Code into misdemeanors* in instances in which previously they were felonies, and the maximum penalty of one year's imprisonment or a $1,000 fine, or both, has been prescribed." (Emphasis added).

No such review of *maximum* penalties was undertaken by the Louisiana State Law Institute in its preparation of the Louisiana Criminal Code of 1942, now reenacted as Title 14 of the Revised Statutes of Louisiana and in which the offense of Peeping Tom is found. Dale E. Bennett, Professor of Criminal Law at Louisiana State University Law School and Reporter for the revision committee which drafted the Louisiana Criminal Code of 1942 has written at great length of the work of the committee in his article in 5 La. L. Rev. 6 (1942), *The Louisiana Criminal Code.* This article is reproduced in and referred

to throughout Vol. 9 of *West's Louisiana Statutes Annotated*, containing Title 14 of the Louisiana Revised Statutes. In his comments on revision of penalty provisions, reproduced on page 9 of *West's*, *id.*, Professor Bennett makes no mention of any concern for establishing a uniform scheme of maximum penalties proportioned to the seriousness of the various offenses and limits himself to the following remarks:

> "An important change, effected throughout the Code is the elimination of *minimum* penalties, except for a few very serious offenses. This is in accord with a uniform trend in penal legislation to vest a larger discretion in the sentencing judge: and is in recognition of the idea that the criminal himself (his age, physical and mental characteristics, social and economic background, and chance of rehabilitation), as well as the specific crime committed, should be carefully considered in the imposition of sentence. The definitions of and distinctions between substantive crimes are, *at best*, general legislative categorizations of criminal responsibility" (Emphasis added). 5 La. L. Rev. 6, 7 (1942).

Nor was their any reason for the drafters of the Louisiana Criminal Code of 1942 to concern themselves with producing a uniform scheme of maximum sentences geared to the severity of the various offenses. Under Louisiana law the *place where* the accused is to be imprisoned, not the length of imprisonment, is the factor which determines whether he is entitled to trial by jury. La. Const., Art. VII, Sec. 41. If imprisonment may not be at "hard labor", the case may not under the Louisiana

constitutional provision be tried by a jury.' The phrase "imprisonment at hard labor" used in the above cited constitutional provision is a phrase of art used in Louisiana Law denoting confinement in the state penitentiary as opposed to confinement in the parish jail. It has been expressly held by the Louisiana Supreme Court that confinement in the parish jail subject to actual physical hard labor in a road gang is not "imprisonment at hard labor". *State v. Hamilton*, 128 La. 91, 54 So. 482. The distance separating the federal scheme and the Louisiana scheme is so great that one cannot rationally apply the federal standard of 18 U.S.C. 1 to a Louisiana offense to determine its seriousness or not.

One must look to the moral quality of the offense itself where the maximum penalty is six months or less. For this approach there is precedent in the jurisprudence of this Court. *District of Columbia v. Colts*, 282 U.S. 63, 51 S. Ct. 52 (1930). In *Colts*, the defendant was charged with reckless operation of a motor vehicle on the streets of the District of Columbia at a speed greater than 22 miles per hour "so as to endanger property and individuals". The offense was punishable by fine of $100.00 and imprisonment of *30 days*. The Court held that this was a "grave offense" within the jury trial provision of the Sixth Amendment and that the defendant was entitled to a jury trial. The Court based its decision not on the severity of the penalty (a maximum of 30 days), but upon the moral quality of the offense. The court distinguished between offenses which were *malum in se* and offenses which were merely *malum prohibitum*. The Court

found that the language of the statute, "so as to endanger property and individuals", determined that this species of speeding offense was *malum in se.*

The *Colts* case was not cited by the Court in *Duncan* The District of Columbia case cited in *Duncan* by the Court was *District of Columbia v. Clawans*, 300 U. S. 617, 57 S. Ct. 660 (1937), decided seven years after *Colts. Clawans* aptly illustrates the proper application of the distinction drawn in *Colts* between those offenses which are *malum in se* and those which are merely *malum prohibitum.* In *Clawans* the Court held that the defendant, who had been convicted of selling second-hand property without a license, namely, the unused portion of railway excursion tickets, was not entitled to a trial by jury even though the maximum sentence which could be imposed was 90 days, three times the maximum sentence in *Colts.* The violation of this statute was at most an infringment of local police regulations and its moral quality was relatively inoffensive; it was merely *malum prohibitium.* See also *Natal v. State of Louisiana*, 139 U.S. 621, 11 S. Ct. 636 (1891) in which no jury was required for the offense of violating a New Orleans city ordinance prohibiting the keeping of a private market within six blocks of a public market.

We respectfully submit that the moral quality of the offense of Peeping Tom, a sex offense, is such that a jury is constitutionally required for its trial even though

that offense is punishable by a maximum sentence of only six months.

For the reasons stated, petitioner should be granted a rehearing.

Respectfully submitted,

JACK AND JACK

By: .....

Wellborn Jack, Jr.
1625 Slattery Building
Shreveport, Louisiana
Attorney for Appellant

ATTORNEY OF RECORD:

.....

Billy R. Pesnell,
Texas Eastern Building
Shreveport, Louisiana

June, 1968